NO: 257401-III

COURT OF APPEALS DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Plaintiff/Respondent

v.

JOEL R. RAMOS
Defendant/Appellant

BRIEF OF RESPONDENT

Kenneth L. Ramm
WSBA 16500
Deputy Prosecuting Attorney
Yakima County Courthouse
128 N. 2nd Street, Rm 329
Yakima WA 98901

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

A. ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR 1

B. ANSWERS TO ASSIGNMENTS OF ERROR..... 1

II. STATEMENT OF THE CASE 2

III. ARGUMENT 6

A. The juvenile court properly transferred jurisdiction to the adult court division of the Yakima Superior Court 6

1. Standard of Review 6

2. Argument 7

B. The trial unit of prosecution for first degree felony Murder is each death 12

1. Standard of Review 12

2. Argument 12

IV. CONCLUSION 18

TABLE OF AUTHORITIES

Washington State Cases

In re Pers. Restraint of Dalluge, 152 Wn.2d 772, 100 P.3d 279 (2004) 9, 11

State v. Clark, 117 Wn. App. 281, 71 P.3d 224 (2003) 13

State v. Fisher, 131 Wn. App. 125, 126 P.3d 62 (2006) 16

State v. Fjermestad, 114 Wn.2d 828, 791 P.2d 897 (1990) 11-12

State v. Keller, 143 Wn.2d 267, 19 P.3d 1030 (2001) 6

State v. Mendoza-Lopez, 105 Wn. App. 382, 19 P.3d 1123 (2001) 10

State v. Salavea, 151 Wn.2d 133, 86 P.3d 125 (2004) 7

State v. Schultz, 146 Wn.2d 540, 48 P.3d 301 (2002) 12

Washington State Statutes

RCW 9.94A.400 15-16

RCW 9A.32.030 ..... 13-14, 16

RCW 13.40.020 (16) 8

RCW 13.40.030 11

RCW 13.40.110 7-9

RCW 13.40.140(9) 11

Other Authorities

Morin, *Waiver of Juvenile Court Jurisdiction Under the Juvenile Justice Act of 1977*, 14 Gonz. L. Rev. 369, 377 (1979) 10

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR.

1. Whether the Superior Court had jurisdiction over the appellant when it took his guilty plea and sentenced him after having accepted his waiver to juvenile court jurisdiction?

2. Whether the unit of prosecution for first degree felony murder is based upon the underlying felony or each death resulting from that felony?

B. ANSWERS TO ASSIGNMENTS OF ERROR

1. The trial court had jurisdiction over the appellant and the subject matter when it sentenced him as an adult.

2. RCW 13.04.110 authorizes the juvenile court to decline jurisdiction of juveniles under the age of 15 years upon waiver of the parties and the court.

3. The unit of prosecution for multiple counts of first degree felony murder is each death resulting from that felony.

II. STATEMENT OF THE CASE.

On August 23, 1993, Joel Ramos agreed to have the juvenile court transfer his case to the adult court division of the Yakima County Superior Court. During the hearing to transfer his case, the record shows that the judge engaged in a colloquy with Mr. Ramos concerning his waiver of his right to a declination hearing. Initially, one of Mr. Ramos's attorney's, Ms. VanNostern, advised the court that, after being fully advised and after careful consideration, that Mr. Ramos wanted to waive his right to a declination hearing and asked that the case be transferred to adult felony court. (08-23-1993 RP 2). Ms. VanNostern gave the court some background information regarding that decision. Ms. VanNostern stated to the court that Mr. Ramos had been fully informed on several occasions of his right to a declination hearing, and that he had a right to present witnesses at that hearing. (08-23-1993 RP 3). Further, that the State would be presenting witnesses and that the defense would have a right to cross-examine them. That he had a right to be evaluated as to his sophistication and maturity, and that would be done on behalf of both the State and his defense. (08-23-1993 RP 3). That the defense would have a right to present evidence as to his ability

to function as an adult or a child, and the nature of the crime in which he was involved. (08-23-1993 RP 3).

Defense counsel indicated to the court that they were prepared to present a complete social history, including a drug/alcohol evaluation, medical background, educational background, family background and biographies of the family members. Also, to present testimony from family members, teachers, forensic expert and probation counselors. (08-23-1993 RP 3). That they had carefully explained to Mr. Ramos what a decline hearing would entail, both factually and legally. (08-23-1993 RP 3-4). They had explained to him the facts as they had perceived them. That with that information, Mr. Ramos, after consulting with his attorneys and with his family members, and having reviewed the agreed findings of fact, conclusions of law and order transferring of jurisdiction, on his own volition he waived his right to a decline hearing. (08-23-1993 RP 4).

The trial court engaged in a colloquy with the defendant, seeking to determine whether the waiver was knowing, intelligently and voluntarily made. (08-23-1993 RP 4-6). The court first asked the defendant whether it was his signature on the Agreed Findings. (08-23-1993 RP 4). The court then asked the defendant how far he had gotten

in school, and whether he was comfortable reading, listening and speaking the English language. Mr. Ramos acknowledged that he had gone through the sixth grade and that he was comfortable in reading, listening and speaking the English language. (08-23-1993 RP 4). Mr. Ramos acknowledged that he had grown up in the Yakima Valley. (08-23-1993 RP 4-5).

The judge then asked him whether he had spoken with his attorneys about the document before he had signed it. Mr. Ramos replied in the affirmative. (08-23-1993 RP 5). The judge asked Mr. Ramos if he had read it himself, to which he replied in the affirmative. (08-23-1993 RP 5). The judge then asked Mr. Ramos whether he understood all of the words and thoughts that where contained in each of the paragraphs and sentences on the four pages of the document. Mr. Ramos replied in the affirmative. (08-23-1993 RP 5).

Next the judge asked Mr. Ramos whether he recalled his attorney, Ms. VanNostern say that she had discussed with him what a decline hearing was. Mr. Ramos replied in the affirmative. (08-23-1993 RP 5). The judge then inquired whether he was told by his attorney what the procedure was for a decline hearing. Mr. Ramos replied in the affirmative. (08-23-1993 RP 5). Then the judge stated

that to Mr. Ramos that it was a fact that they had talked to him about what a hearing would be and what evidence would be presented by both the prosecution and then the defense, in his favor. Mr. Ramos replied in the affirmative. (08-23-1993 RP 5-6). The judge asked him if he understood that he could have family members testify, and school teachers. And that Dr. Duthie, his psychologist would likely testify and anyone else his attorneys thought important. (08-23-1993 RP 6).

The judge then asked Mr. Ramos whether anybody forced him or threatened him or in any way coerced him into giving up his right to a decline hearing and consenting to be tried as an adult on the charges before the court. Mr. Ramos replied in the negative. (08-23-1993 RP 6). The judge then as him if he had spoken to his mother about his decision and he replied that he had. The court inquired of Ms. VanNostern, as to whether she had talked to his mother, and she replied in the affirmative. Ms. VanNostern affirmed to the court that she and Ms. Parker, Mr. Ramos's other attorney, had discussed this decision. (08-23-1993 RP 6-7).

The court then found that Mr. Ramos had the capacity to make the decision to waive the decline hearing and that his decision was made knowingly, voluntarily and willingly. The court further made

findings relating to the Kent criteria as listed in the findings. (08-23-1993 RP 7; CP 30-32). Mr. Ramos was next arraigned on the charges under an adult cause number and entered a guilty plea and was sentenced. (08-23-1993 RP 8-36; CP 10-16, 6-9).

III. ARGUMENT.

A. THE JUVENILE COURT PROPERLY TRANSFERRED JURISDICTION TO THE ADULT DIVISION OF THE YAKIMA SUPERIOR COURT.

1. Standard of Review.

Statutory interpretation is a question of law, which the appellate court reviews de novo. "Courts should assume the Legislature means exactly what it says. Plain words do not require construction. The courts do not engage in statutory interpretation of a statute that is not ambiguous. If a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself. A statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable. The courts are not 'obliged to discern any ambiguity by imagining a variety of alternative interpretations.'" *State v. Keller*, 143 Wn.2d 267, 276-277, 19 P.3d 1030 (2001).

2. Argument.

"The right to be tried in a juvenile court is not constitutional and the right attaches only if a court is given statutory discretion to assign juvenile or adult court jurisdiction." *State v. Salavea*, 151 Wn.2d 133, 140, 86 P.3d 125 (2004). The statute subject to interpretation, RCW 13.40.110, states as follows:

> RCW 13.40.110. Hearing on question of declining jurisdiction--Held, when—Findings
>
> (1) The prosecutor, respondent, or the court on its own motion may, before a hearing on the information on its merits, file a motion requesting the court to transfer the respondent for adult criminal prosecution and the matter shall be set for a hearing on the question of declining jurisdiction. Unless waived by the court, the parties, and their counsel, a decline hearing shall be held where:
>
> (a) The respondent is fifteen, sixteen, or seventeen years of age and the information alleges a class A felony or an attempt, solicitation, or conspiracy to commit a class A felony; or
>
> (b) The respondent is seventeen years of age and the information alleges assault in the second degree, extortion in the first degree, indecent liberties, child molestation in the second degree, kidnapping in the second degree, or robbery in the second degree.
>
> (2) The court after a decline hearing may order the case transferred for adult criminal prosecution upon a finding that the declination would be in the best interest of the juvenile or the public. The court shall consider the relevant reports, facts, opinions, and arguments presented by the parties and their counsel.
>
> (3) When the respondent is transferred for criminal prosecution or retained for prosecution in juvenile court, the court shall set forth in writing its finding which shall be supported by relevant facts and opinions produced at the hearing.

HISTORY: 1990 c 3 § 303; 1988 c 145 § 18; 1979 c 155 § 63; 1977 ex.s. c 291 § 65.

The first sentence of RCW 13.40.110 clearly states that the prosecutor may "file a motion file a motion requesting the court to transfer the respondent for adult criminal prosecution and the matter shall be set for a hearing on the question of declining jurisdiction." The language of the statute does not limit the question of declination to any specific age. The statute states "the respondent" referring to the one who could be subject to declination. "Respondent" means a juvenile who is alleged or proven to have committed an offense. RCW 13.40.020 (16), (1992). From this definition, the appellant's argument that a 14 year old can not be the subjection of a declination hearing is without merit since there is no limit based upon the age of the respondent.

The appellant further argues that respondents less than 15 years old cannot waive there "right" to be tried as a juvenile since there is not a "procedure" for waiver set out in RCW 13.40.110. [Ramos Opening Brief, pg. 16]. However, this argument fails to recognize three things. First, by its very terms RCW 13.40.110 recognizes that the hearing can be waived. RCW 13.40.110 states that "[u]nless waived by the court, the parties, and

their counsel, a decline hearing shall be held when . . ." This language establishes that the legislature contemplated that the decline hearing could be waived by the respondent.

The statute itself states that the hearing may be waived upon the agreement of the parties, including the court. RCW 13.40.110(1). The Supreme Court stated in *In re Pers. Restraint of Dalluge*, 152 Wn.2d 772, 780, 100 P.3d 279 (2004), that:

> [T]he juvenile court may conduct a decline hearing upon the request of a party or on its own motion. RCW 13.04.030(1)(e)(i); RCW 13.40.110. Key to this case is the provision that unless waived by the juvenile court, the parties, and their counsel, a decline hearing in juvenile court must be held if the respondent is 15, 16, or 17 years old and the information alleges a class A felony such as rape in the second degree, the amended charge in this case. RCW 13.40.110(1)(a); RCW 9A.44.050. n3 After the decline hearing, the juvenile court can waive its exclusive jurisdiction by "transferring jurisdiction of a particular juvenile to adult criminal court," RCW 13.04.030(1)(e)(i), "upon a finding that the declination would be in the best interest of the juvenile or the public." RCW 13.40.110(2). n4
>
> n3 The dissent seems to ignore this provision, which clearly requires waiver not only by the parties and their counsel but also by the juvenile court.
>
> n4 Although the State asserts that parties can stipulate to adult court jurisdiction, it cites to no authority that suggests that parties may independently agree to adult court jurisdiction without approval from the juvenile court.

The interpretation of this statue clearly contemplates that there can be waiver of juvenile court jurisdiction by a juvenile at any age. In fact, the Juvenile Justice Act of 1977 was amended to permit a juvenile to move the court for a transfer of the respondent to adult criminal jurisdiction. *See* Morin, *Waiver of Juvenile Court Jurisdiction Under the Juvenile Justice Act of 1977*, 14 Gonz. L. Rev. 369, 377 (1979).

In *State v. Mendoza-Lopez*, 105 Wn. App. 382, 387, 19 P.3d 1123 (2001), the court held that "[a]n underage defendant waives his or her statutory right to a declination hearing when the defendant willfully deceives the trial court into believing that he or she is more than 17 years old and does not correct this deception until after being found guilty." Thus, if a defendant can be imputed to have waived his statutory right to a declination hearing by deception, why can't he or she expressly waive his or her statutory right? The statute would not make any sense if it were interpreted not to mean that if a respondent juvenile moves the court for an order declining juvenile jurisdiction, then a respondent should be able to expressly waive juvenile jurisdiction upon agreement of the State and approval by the court, as per the statute. To rule otherwise would ignore this provision of the statute.

Second, juvenile court jurisdiction is personal jurisdiction. RCW 13.40.030. As the court in *In Re Dalluge*, 152 Wn.2d 772, 782, fn. 5, 100 P.3d 279 (2004) recognized that "[i]t is important to note that subject matter jurisdiction cannot be waived, but personal jurisdiction can be waived. Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County, 135 Wn.2d 542, 556, 958 P.2d 962 (1998). Jurisdiction requirements embodied in statues can be waived, but waiver should be found only sparingly. Lewis County v. W. Wash. Growth Mgmt. Hr'gs Bd., 113 Wn. App. 142, 155, 53 P.3d 44 (2002)." In this case Mr. Ramos knowingly, intentionally, and voluntarily waived juvenile court jurisdiction when that waiver was accomplished with the assistance of two attorneys and with the approval of the court.

And third, as recognized by the appellant, RCW 13.40.140(9), (1992), provides that "[w]aiver of any right which a juvenile has under this chapter must be an express waiver intelligently made by the juvenile after the juvenile has been fully informed of the right being waived." The appellant tries to limit the breadth of this provision, but fails to since, by its very terms, it applies to "*any*" right under Chapter 13.40. The Supreme Court has previously stated that "[a] nontechnical statutory term may be given its dictionary meaning. State v. Olson, 47 Wn. App. 514, 516-17,

735 P.2d 1362 (1987). Furthermore, statutes should be construed to effect their purpose and unlikely, absurd or strained consequences should be avoided. State v. Stannard, 109 Wn.2d 29, 742 P.2d 1244 (1987). Thus, Webster's II New Riverside University Dictionary (1984) defines the word "any" as: "the whole amount of: ALL." *State v. Fjermestad*, 114 Wn.2d 828, 835, 791 P.2d 897 (1990). Thus, the statutes contemplates that all of the rights of a juvenile can be waived.

As can be deduced from the record, either Mr. Ramos saw the writing on the wall and agreed to waive the declination hearing in exchange for a favorable plea agreement in adult court where the State would agree not to file all the murder charges as aggrevated first degree murder counts and recommend a sentence of 80 years. As a result, it can be concluded that Ramos made a knowing, intelligent and voluntary waiver of his right to have a declination hearing.

B. THE UNIT OF PROSECUTION FOR FIRST DEGREE FELONY MURDER IS EACH DEATH.

1. Standard of Review.

Questions of law are reviewed de novo. *State v. Schultz*, 146 Wn.2d 540, 544, 48 P.3d 301 (2002).

2. Argument.

The appellant agues that the three counts of felony murder should count as one crime. This argument is wholly without merit. "Double jeopardy protects a defendant from multiple convictions under the same statute if he or she commits only one unit of the crime. State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). Thus, when a defendant is convicted of multiple violations of the same statute, we review the statute to determine what "unit of prosecution" the legislature intended to be a punishable act. Adel, 136 Wn.2d at 634." *State v. Clark*, 117 Wn. App. 281, 285, 71 P.3d 224 (2003). Upon examination of the first degree felony murder statute, RCW 9A.32.030, it states that:

(1) A person is guilty of murder in the first degree when:

. . . . . .

(c) He or she commits or attempts to commit the crime of either (1) robbery in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first or second degree, or (5) kidnapping in the first or second degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, *causes the death of a person* other than one of the participants. . . .

The language of the statute refers to "a person" as the operative phase. That language indicates that the legislature intended to measure punishment by the number of individuals who were victims, not each felony as the appellant argues. In *State v. Ose*, 156 Wn.2d 140, 148, 124 P.3d 635 (2005), the court held that:

> [t]his court has consistently interpreted the legislature's use of the word "a" in criminal statutes as authorizing punishment for each individual instance of criminal conduct, even if multiple instances of such conduct occurred simultaneously. For example, in Westling, we considered the second degree arson statute and the difference between the word "a" and the word "any." The statute at issue in Westling provided that "[a] person is guilty of arson in the second degree if he knowingly and maliciously causes a fire or explosion which damages a building, or any . . . automobile." RCW 9A.48.030(1) (emphasis added). The Westling court held that because the legislature used the words "a fire," the unit of prosecution for the arson statute was per fire caused by the defendant. 145 Wn.2d at 611-12. In contrast, the court found the language "any . . . automobile" indicated that only "one conviction is appropriate where one fire damages multiple automobiles." Id.
>
> Similarly, in State v. Root, 141 Wn.2d 701, 9 P.3d 214 (2000), we considered how the legislature's use of the words "a minor" in the sexual exploitation of a minor statute, RCW 9.68A.040, impacted the unit of prosecution analysis. The Root court ultimately concluded that because "[t]he statute specifically states 'a minor,' . . . [the defendant] may be charged per child involved." Id. at 710-11.
>
> Likewise, in State v. DeSantiago, 149 Wn.2d 402, 68 P.3d 1065 (2003), we interpreted RCW 9.94A.533(3) and (4), which allows sentence enhancement if a defendant or an accomplice was armed with "'a' firearm" or "'a' deadly weapon." Id. at 418. We concluded that the statute allows a defendant to "be punished for 'each' weapon involved." Id. at 419.

> Most recently, in Graham, we considered the unit of prosecution for the reckless endangerment statute, which provides that "[a] person is guilty of reckless endangerment when he or she recklessly engages in conduct not amounting to drive-by shooting but that creates a substantial risk of death or serious physical injury to another person." RCW 9A.36.050(1) (emphasis added). The Graham court interpreted "another" as a "compound of 'an + other,' and the indefinite article 'an' means 'a,' the letter n being an addition before a following vowel sound." 153 Wn.2d at 406 n.2 (citing WEBSTER'S, supra, at 89, 75). Accordingly, we held that "[i]n light of the plain language of RCW 9A.36.050(1), as well as the nature of reckless endangerment as a crime against the person, . . . the unit of prosecution for the crime of reckless endangerment is each person endangered." Id. at 407-08.
>
> When this court engages in statutory construction we presume that the legislature is aware of our prior interpretations of its enactments. Tili, 139 Wn.2d at 116 (citing Friends of Snoqualmie Valley v. King County Boundary Review Bd., 118 Wn.2d 488, 496, 825 P.2d 300 (1992)). Thus, consistent with our prior construction of similarly worded statutes, we now hold that the legislature, by use of the language "a stolen access device," unambiguously defined the unit of prosecution in RCW 9A.56.160(1)(c) as each access device in a defendant's possession. Accordingly, we hold that Ms. Ose's multiple convictions for possessing multiple stolen access devices did not violate the double jeopardy prohibition.

Furthermore, under the former RCW 9.94A.400, it is not the "same criminal conduct" to punish the defendant for multiple deaths during one first degree burglary/robbery. "The same criminal conduct requires two or more crimes to involve (1) the same criminal intent, (2) the same time and place, and (3) the same victim. `If any one of these elements is missing,

the offenses must be individually counted toward the offender score.' A sentencing court's determination of same criminal conduct will be reversed only for a clear abuse of discretion or misapplication of law." *State v. Fisher*, 131 Wn. App. 125, 133, 126 P.3d 62 (2006).

The appellant's use of federal law with regard to the intent to the Washington State Legislature is also meritless. The issue must be analyzed according to Washington State law and the intent of the Washington State Legislature, interpreting RCW 9A.32.030.

Since all the first degree felony murder counts involved different victims, they cannot be considered the "same criminal conduct," and thus cannot be double jeopardy.

Respectfully submitted this 29th day of April, 2009.

/s/ Kenneth Ramm

Kenneth L. Ramm, WSBA 16500
Deputy Prosecuting Attorney
Attorney for Yakima County

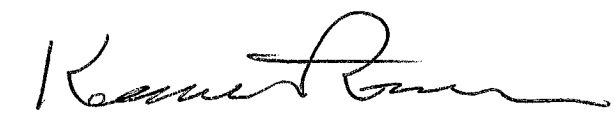
Certificate of Service

I, Kenneth L. Ramm, hereby certify that on this date I served copies of the foregoing by depositing the same in the US Mail, first class postage prepaid, and addressed to:

Sheryl Gordon McCloud
Attorney at Law
710 Cherry Street
Seattle, WA 98104-1925

Joel Ramos
#712229
Airway Heights Corrections Center
PO Box 2049
Airway Heights, WA 99001

Dated at Yakima WA this 29th day of April, 2009.



Kenneth L. Ramm, WSBA 16500